

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-2143

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 77-2143

MARIANO SALOMON,

Petitioner-Appellant.

v.

J. EDWIN LA VALLEE, SUPERINTENDENT, CLINTON
CORRECTIONAL FACILITY,

Respondent-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX FOR PETITIONER-APPELLANT
MARIANO SALOMON

DAVID BLACKSTONE
401 Broadway
New York, New York 10013
Tel. 226-6684 *

Attorney for Petitioner-Appellant
Mariano Salomon

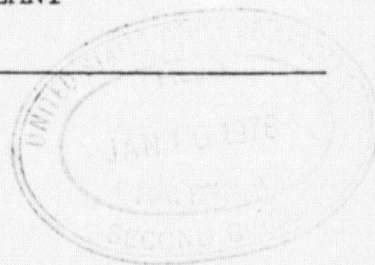


TABLE OF CONTENTS

	Appendix
DOCKET SHEET.....	A
MEMORANDUM DECISION OF JUDGE MILTON POLLACK, DATED JULY 20, 1976.....	B
REMAND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED MARCH 11, 1977.....	C
MEMORANDUM DECISION OF JUDGE MILTON POLLACK, DATED JUNE 17, 1977.....	D
PRO SE PETITION OF MARIANO SALOMON, DATED MARCH 12, 1976.....	E
AFFIDAVIT OF ASSISTANT ATTORNEY GENERAL JOAN SCANNELL IN OPPOSITION, DATED JULY 14, 1976.....	F

EXHIBIT A

PROCEEDINGS

DATE	NR.	PROCEEDINGS
8-08-76	1	Filed petition for writ of Habeas corpus.
8-08-76	2	Filed order granting petitioner to proceed in forma pauperis, Lasker, J.
8-04-76	3	Filed notice of assignment to Pollack, J.
8-11-76	4	Filed OTHER that respondent's time to file opposition to petitioner's application for writ of h/c is extended to 6/29/76. Pollack, J. (mn) <i>re ruled</i>
7-20-76		Filed ORDER granting Petitioner for writ of Habeas corpus. Filed in 11/11/76.
7-14-76	5	Filed Affdvt by Joan P. Scannel in opposition to petitioner's application for writ of Habeas Corpus.
7-26-76	6	xxxxxx Order that xxxxxxxx extended to 8/23/76. Ordered that xxxxxxxx of xxxxxxxx Court xxxxxxxx State of NY xxxxxxxx copy of xxxxxxxx xxxxxxxx indicated. <i>in 2/11/77</i>
8-31-76	6	Filed memo end on Memo to Pollack, J. from Frances Salten (Pro Se Clk) Certificate of probable cause is denied. See Opinion undersigned herein dated 7/20/76. So Ordered Pollack, J (mn-pro se)
9-8-76	7	Filed petitioner's notice of appeal from order dismissing petition for writ of habeas corpus on 7/20/76. Pro Se Clerk mailed copies to : petitioner at Box B, Dannemora, N.Y. and Atty. General of New York.
10-17-76	8	<i>Filed notice of appeal from order dismissing petition for writ of habeas corpus on 7/20/76. Pro Se Clerk mailed copies to : petitioner at Box B, Dannemora, N.Y. and Atty. General of New York.</i>
10-17-76	9	Filed two copies of 100, no Clerk that judgment of a district court in vacate is requested for reconsideration of motion of Lasker, J. 11/11/76. Filed copy to petitioner and notice to Atty Gen. State of NY
10-17-76	10	Filed Notice of appeal from order of assignment to Pollack, J. of Federal Defendants Unit to submit perfected transcript of law and to protect rights.
10-17-76	11	Filed two copies of 100, no Clerk that judgment of a district court in vacate is requested for reconsideration of motion of Lasker, J. 11/11/76. Filed copy to petitioner and notice to Atty Gen. State of NY
10-17-76	12	Filed two copies of 100, no Clerk that judgment of a district court in vacate is requested for reconsideration of motion of Lasker, J. 11/11/76. Filed copy to petitioner and notice to Atty Gen. State of NY
10-17-76	13	Hearing begun before Pollack, J.
10-17-76	14	Hearing concluded. Decision Reserved.
10-17-76	15	Filed Memorandum & Order for the reason stated the petition for a writ of habeas corpus is denied. POLLACK J. m/n copy to petitioner.
10-17-76	16	Filed memo end on entry # 10 re Counsel for plttf was appointed & served on the hearing held 6/2/77 POLLACK J m/n copy to plttf.
10-17-76	17	Filed Petitioner's Writ of H/C Ad Testificandum.
10-17-76	18	Filed CJA 20 appt of counsel-David Blackstone-401 Bway, Suite 1502, NY, NY 10013 .Tel:226-6684
10-17-76	19	Filed CJA 20 approval of payment of fees for counsel-David Blackstone
10-17-76	20	Filed Memo End. on USCA, 2nd Circuit Appellant's time should be extended as of that Court of Appeals to July 28, 1977 and Notice of Appeal is ordered filed as of that date on grounds of excusable error and neglect in the circumstances and as so ordered filed, the appeal has been timely taken .So Ordered. Pollack, J. m/n copy to Pro Se and m/n to deft. (to EA)
10-17-76	21	Filed Notice that orig. record has been certified and transmitted to USCA, 2nd Circuit

EXHIBIT B

MARIANO SALOMON v. J. EDWIN LaVALLEE, Superintendent,
Clinton Correctional Facility

76 Civ. 1640 (MP)

PRO SE

This is a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 by a state prisoner who challenges both his conviction and sentence. The petition is denied for the reasons which appear hereafter.

Petitioner was convicted on June 11, 1974 after a jury trial in the Supreme Court, New York County, of the crimes of Criminal Sale and Possession of a Controlled Substance in the First Degree. He was sentenced to concurrent indeterminate terms of twenty years to life imprisonment, and is presently confined at the Clinton Correctional Facility. The conviction was affirmed by the Appellate Division, First Department, 377 N.Y.S.2d 347 (1975), and leave to appeal was denied by the New York Court of Appeals.

I.

Petitioner's chief attack on the constitutionality of his conviction is bottomed on the allegation that he was denied the effective assistance of counsel guaranteed to him by the Sixth Amendment to the Constitution. He asserts that his retained counsel was inadequately prepared for trial, subject to a conflict in interest arising from his joint representation of petitioner and a co-defendant, and improperly replaced by another attorney from his office prior to the delivery of the jury charge.

These attacks have little merit. First, petitioner expressly consented on the trial record to both the adequacy of his counsel's preparation and to the substitution of counsel late in the trial proceedings. (Transcript at 14;650). Thus, the only contention petitioner may properly

assert in this collateral attack is that arising from the joint representation of the two defendants at trial by a single attorney; the trial judge apparently made no inquiry concerning the potential conflict in interest, and petitioner did not expressly waive his right to challenge the effectiveness of his counsel on that basis.

It is established in this Circuit that "'some specific instance of prejudice, some real conflict of interest, resulting from a joint representation must be shown to exist before it can be said that an appellant has been denied the effective assistance of counsel.'" United States v. DeBerry, 487 F.2d 448, 452 (2d Cir. 1973) ...^{*} Petitioner has failed to make the requisite concrete showing. His allegation that his counsel focused primarily on the defense of his co-defendant is not borne out by the trial record, which contains numerous examples of the care defense counsel took to avoid rulings which might have been prejudicial to the petitioner. (Transcript at 285, 368, 516.)

Petitioner's strongest argument is that the defense counsel was subject to a severe conflict in interest when he requested, solely on behalf of the co-defendant, that

^{*}/ This burden of proof shifts to the prosecution to prove the absence of prejudice where the trial judge has failed to advise the defendants of a potential conflict, see United States v. DeBerry, *supra*; this shift has been devised by the federal courts of appeals in the exercise of their supervisory power, however, and is not constitutionally compelled, see United States v. Mari, 526 F.2d 117, 120 (2d Cir. 1975) (Cakes, J., concurring). Accordingly, it is not applicable to the review of state court proceedings on a petition for a habeas writ, and petitioner has the burden to demonstrate he was prejudiced by the joint representation.

the judge instruct the jury that it must acquit the co-defendant were it to find he acted as the agent of the buyer in the narcotics transaction at issue, and not in concert with the seller. Petitioner claims that this in effect conceded that a sale took place and thereby prejudiced his own denial of guilt in regard to the alleged transaction.

While the inconsistency in the defenses of the two defendants may have worked to petitioner's detriment, that possible prejudice did not arise because the defendants were jointly represented, but because they were joined as defendants in the same trial proceeding; there is no reason to believe that counsel for the co-defendant would not have pressed the "buyer's agent" defense had each defendant been represented by his own attorney. Moreover, petitioner makes no claim that he was dissuaded from testifying in his own defense because of the joint representation. See United States v. Lovano, 420 F.2d 769, 774 (2d Cir.), cert. denied, 397 U.S. 1071 (1970). Thus, although prudence would have dictated individual representation in this case, petitioner has not shown any prejudice arising from its absence.

Petitioner's remaining challenges to his conviction, concerning the trial judge's preliminary and supplemental instructions to the jury, are not cognizable by the federal courts on a habeas corpus petition. See Cupp v. Naughten, 414 U.S. 141, 146 (1973).

II.

Since the severity of a sentence is not subject to review on a habeas corpus petition where it is within the limits set by statute, absent circumstances which are not present here, petitioner's challenge to his sentence on the grounds of excessiveness must fail. See Dorszynski v. United States, 418 U.S. 424, 431 (1974); Townsend v. Burke, 334 U.S. 736, 741 (1948).

Similarly, petitioner's contention that the mandatory sentencing provisions of the recently-amended New York State drug laws constitute cruel and unusual punishment is without merit. See People v. Broadie, 37 N.Y.2d 100, 371 N.Y.S.2d 471 (1975); People v. Hines, 376 N.Y.S.2d 72 (Ulster County Ct. 1975).

Accordingly, the petition for a writ of habeas corpus is denied in all respects.

SO ORDERED.

Milton Pollack

July 20, 1976

Milton Pollack
U.S. District Judge

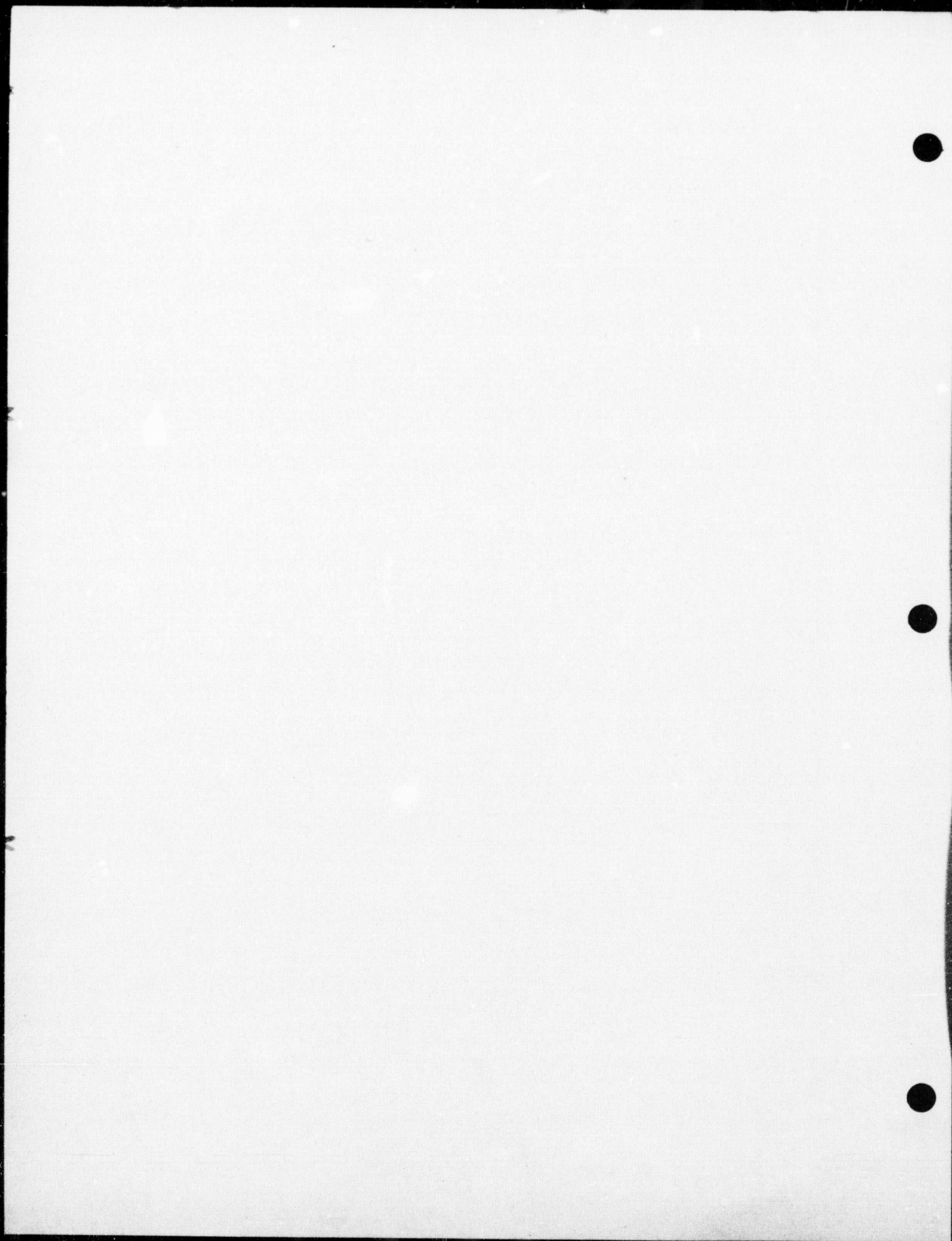


EXHIBIT C

194 33
3/1/11
75-011

UNITED STATES COURT OF APPEALS

Second Circuit

62760

At a Sated Term of the United States Court of Appeals, in and for the Second
Circuit, held at the United States Court House, in the City of New York, on the
11th day of March, one thousand nine hundred
and SEVENTY-SEVEN.

Horacio Pollack,

Appellant,

v.

J. B. InVallie, Superintendent,

Appellee.

76 Civ. 1640 Pollack -

Appellant

A motion having been made herein by ~~SEALIN~~ pro se for a certificate of probable
cause, for leave to proceed in forma pauperis, ~~for assignment of the assignment of the~~
~~assignment of the assignment of the assignment of the assignment of the assignment of the~~
~~assignment of the assignment of the assignment of the assignment of the assignment of the~~
and
~~assignment of the assignment of the assignment of the assignment of the assignment of the~~
for the assignment of counsel ~~and for~~

Upon consideration thereof, it is

Ordered that said motion be ~~granted~~ ~~denied~~ the judgment of the
district court is vacated and the cause is remanded for
consideration of the question of waiver.

of Robert H. H. H. H.

of H. H. H.

William H. Bulligan

William H. Bulligan

James H. O'Brien

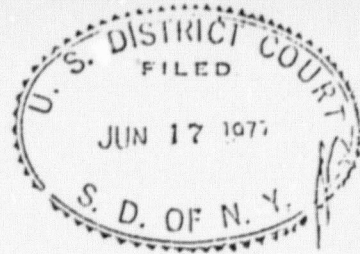
James H. O'Brien

Frederick V. Brye

Frederick V. Brye Circuit Judges.

W. H. H. Brye

EXHIBIT D



MEMORANDUM

MARIANO SALOMON v. J. EDWIN LaVALLEE, Superintendent,
Clinton Correctional Facility 76 Civ. 1640(MP)

This is a petition pursuant to 28 U.S.C. § 2254 for a writ of habeas corpus. A prior judgment of this Court denying the instant petition was vacated by the Court of Appeals for the Second Circuit for consideration of the question of waiver which had not previously been addressed specifically. Upon consideration of that question in the framework of the facts in the instant situation, the petition is nevertheless again denied.

Petitioner was convicted on June 11, 1974 after a jury trial in the Supreme Court, New York County, of the crimes of sale and possession of a controlled substance. He was sentenced to concurrent indeterminate terms of twenty years to life imprisonment and is presently confined at the Greenhaven Correctional Facility.^{1/} The conviction was affirmed, 377 N.Y.S.2d 347 (App. Div. 1975), and leave to appeal was denied by the New York Court of Appeals.

The only claim made by petitioner on this remand is that he was denied the effective assistance of counsel guaranteed by the sixth amendment because his retained state court trial counsel represented both petitioner and a codefendant. That claim was found wanting in merit upon initial consideration of this petition on the ground that petitioner had failed to show any prejudice resulting from the joint representation.

^{1/} Petitioner was confined in the Clinton Correctional Facility at the time this Court assumed jurisdiction.

"[I]t is the rule that [a petitioner] claiming a conflict by counsel must demonstrate some specific instance of prejudice resulting from the joint representation that would warrant vacature of his conviction." Abraham v. United States, Slip Op. 76-2135/6, 76-2150, 76-2152 (2d Cir., Jan. 21, 1977). Petitioner has again failed to meet that burden.

Upon the remand counsel was appointed for the petitioner and an evidentiary hearing was held in which petitioner and his state court lawyers, Messrs. Otto and Fernando Fusco, testified. Petitioner had been represented by Mr. Fernando Fusco in prior matters and was represented by him in two other criminal cases in 1974.) The only alleged specific instance of prejudice now asserted by petitioner^{2/} is that his trial lawyer argued to, and requested that the judge instruct the jury that it must acquit the codefendant if it found that the codefendant had acted as the agent of the buyer in the narcotics sale and not in concert with the unidentified seller. No similar argument was presented on petitioner's behalf, and petitioner contends that this prejudiced his own³ denial of guilt because the "agent for the buyer" defense could be taken to be a concession that a narcotics sale had taken place in which the codefendant was not the real seller and that the jury would be led to believe that the petitioner was that seller.

Otto Fusco, Esq., petitioner's experienced trial lawyer, testified that his theory of defense for the petitioner was that he was not a seller of drugs, and indeed was not involved in the drug transaction in issue at all, but instead was a mere innocent bystander. He so summed up to the jury. Mr. Fusco's trial argument that the codefendant was an agent of the narcotics purchaser in no way implied that petitioner was the seller. While it may have amounted to a concession that some drug transaction did take place

^{2/}Petitioner testified herein that his trial lawyer did nothing to dissuade him from taking the stand, but rather left it within petitioner's discretion. Neither petitioner nor the codefendant chose to testify at trial. Petitioner had a prior narcotics conviction.

in which the codefendant was a participant, that was in no way inconsistent with nor prejudiced the defense that petitioner was merely an innocent bystander to whatever had occurred in respect of the codefendant.

Mr. Fusco's decision to use an "agent for the buyer" defense for the codefendant and an "innocent bystander" defense for petitioner was simply a matter of trial strategy, based on his evaluation of the prosecution's evidence, which in no way prejudiced petitioner. Mr. Fusco testified that the two defenses were not, in his opinion, antagonistic, and stated that the evidence adduced in the case would not have supported an inference that petitioner was an agent for the buyer. Seemingly, to so argue for petitioner might well have drawn him into the circle of the sale instead of leaving him outside of it as an innocent bystander. The codefendant was in fact found guilty despite the "agent for the buyer" defense urged on his behalf.

Both Otto and Fernando Fusco testified that they saw no potential or actual conflict in the joint representation of petitioner and his codefendant, and that they would have withdrawn from the representation of one of the defendants if they had.

Petitioner has failed to demonstrate that the joint representation or his lawyer's trial strategy was conducive to or created or resulted in any conflict of interest or prejudice. Consequently, the question of waiver of his sixth amendment rights is not and need not be reached in the circumstances of this case. Moreover, petitioner testified that his attorney discussed with him the proposed use of the "agent for the buyer" defense for the codefendant before the summation and requests to charge were made, and that petitioner had expressed his approval. Petitioner testified on the hearing that he did not understand what was meant, but the record herein and the demeanor evidence satisfy the Court that such testimony is not worthy of belief and is factually rejected.

Petitioner and the codefendant had expressly told the trial judge that they were willing to be represented by Mr. Fusco, and neither expressed any concern to Mr. Fusco or the judge during the trial.

Accordingly, the petition for a writ of habeas corpus is denied.

So ordered.

Milton Pollack

June 17th 1977

Milton Pollack
U.S.D.J.



EXHIBIT E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES,

Ex rel., MARIANO SALOMON,

Petitioner,

- against -

Hon. J. EDWIN LaVALLEE, Superintendent,
Clinton Correctional Facility,

Respondent.

:
: APPLICATION FOR A WRIT
: OF HABEAS CORPUS

: Pursuant to TITLE 28
: U.S.C., Sec., 2254

: CIVIL No. _____

STATE OF NEW YORK)
) ss.:
COUNTY OF CLINTON)

Mariano Salomon, First being duly sworn, deposes and says :

1.) That Mariano Salomon, is the relator herein, and in all matters pertaining to this application.

2.) I respectfully make this application to set aside the judgment of conviction from the Supreme Court, New York County, entered on June 11, 1974, convicting relator, after a jury trial, of Criminal Sale of a Controlled Substance in the First Degree and sentencing him to imprisonment for natural life with a minimum period of twenty years on each count to run concurrently.

(Indictment Number N I622 - 416 of 1973.)

3.) This application is made in good faith to contest the legality and constitutionality of the conviction, by the denial of "Due Process and Equal Protection of the Law" under the Constitution of the State of New York, and the Constitution of the United States.

4.) Relator has exhausted his State Court remedies in the Appellate Division : First Department, and the New York State, Court of Appeals. (see, Exhibits "A" and "B" attached)

5.) Relator has exhausted his State Court remedies, and now makes this application to the United States District Court, Southern District of New York, to determine the following questions involving due process of law.

QUESTIONS INVOLVED

- 1.) Did Trial Counsel's simultaneous representation of Petitioner and his Co-Defendant deprived Petitioner of effective assistance of counsel because trial counsel was preoccupied with the defense of the Co-Defendant? Did the use of the defense of agency of the buyer as a defense for the co-defendant and not for petitioner was clear evidence of a conflict between Petitioner and his co-defendant and of the inadequacy of representation of Petitioner ?
- 2.) Did the Court error in permitting a substitution of counsel during the charge and the deliberations ? Did counsel's delinquency harm petitioner ?
- 3.) Is reversal required because of the failure of the trial Judge to admonish the jury properly in her preliminary instructions ?
- 4.) Is the sentence of imprisonment for natural life with a minimum period of twenty years excessive ?
- 5.) Is life for a non-violent crime so harsh as to constitute cruel and unusual punishment under the State and Federal Constitution ?
- 6.) Is a mandatory minimum sentence of twenty years for a non-violent crime and provides for no opportunity for parole in that time so harsh as to constitute cruel and unusual punishment under the State and Federal Constitutions ?
- 7.) Is New York Penal Law Section 70.00, calling for mandatory sentences unconstitutional, when it does not draw its meaning from the evolving standards of decency that mark the progress of a maturing society ?

POINT ONE

TRIAL COUNSEL'S SIMULTANEOUS REPRESENTATION OF PETITIONER AND HIS CO-DEFENDANT DEPRIVED PETITIONER OF EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE TRIAL COUNSEL WAS PREOCCUPIED WITH THE DEFENSE OF THE CO-DEFENDANT. THE USE OF THE DEFENSE OF AGENCY OF THE BUYER AS A DEFENSE FOR THE CO-DEFENDANT AND NOT FOR PETITIONER WAS CLEAR EVIDENCE OF A CONFLICT BETWEEN PETITIONER AND HIS CO-DEFENDANT AND OF THE INADEQUACY OF REPRESENTATION OF PETITIONER.

Right the opening pages of the record of this trial, the petiti expressed his dissatisfaction with his defense counsel. The petitioner requested a two week postponement of the trial because :

"Only time we have got together was five minutes in the Bull Pen. That's about all." °(6)

The Court proceeded to explain that other counsel from Mr. Fusco's office had been present at previous Court appearances. Petitioner indicated that Mr. Fusco would be the actual person to try this case and that it didn't matter that other people from his office had been there before.

Mr. Fusco explained that if fact he did not spend five minutes with the petitioner but indeed had spent an hour with him. Over the luncheon recess Petitioner was pacified and stated on the record that everything was all right.

Mr. Fusco referred to Mr. Salomon as Mr. "MARIANO" (7) during these preliminary discussions and throughout the trial when rare references were made about petitioner.

In view of the fact that Class A Felonies carrying mandatory life sentences were involved the Court should have vigorously questioned petitioner to see if he was aware of the danger of a conflict when one attorney represents more than one defendant.

Recent decisions, particularly in the Federal Courts have warned of the danger of one attorney representing multiple defendant's and have issued instructions calling for the Trial Court to question defendants and make them aware of this danger.

It is well established that inherent in joint representation of co-defendants in a criminal case is the danger that counsel will not be able to give each client the required attention and loyalty required for a proper defense.

Glasser v. United States, 315 U.S. 60, 75 (1941); Morgan v. United States, 396 F. 2d 110, 114 (2nd Cir. 1968); People v. BYRNE, 17 N.Y. 2d 209, 213 (1966). Appellate Courts have been swift to reverse convictions where the latent possibility of conflicting interests has manifested itself at trial in some patent manner. People v. Glasser, supra; United States v. DuBerry, 487 F. 2d 448, 453 (2d Cir. 1973); People v. Byrne, supra; People v. Sprinkler, 16 A.D. 2d 705 (2d Dept. 1962).

The ABA Standards on the Function of the Trial Judge (section 3.4.) provides that in a multiple defendant situation "the trial judge should inquire into potential conflicts which may jeopardize the right of each defendant to the fidelity of his counsel."

The U.S. Court of Appeals for the First Circuit has promulgated a rule for the trial courts under its jurisdiction:

"It shall be the duty of the trial court, as early in the litigation as practicable, to comment on some of the risks confronted where defendants are jointly represented to insure that defendants are aware of such risks, and to inquire diligently whether they have discussed the risks with their attorney, and whether they understand that they may retain separate counsel, or if qualified, may have such counsel appointed by the court and paid for by the government."
United States v. Foster, 469 F 2d I, 5

In the Foster case the Circuit Court held that there was no conflict under the facts of that specific case. However, they felt it important enough to issue the rules set out above concerning multiple defendant cases.

It may be said in the instant case that petitioner waived his rights to individual representation because he said everything was all right after the luncheon recess. (14)^o Prior to lunch he had claimed that he was being forced to trial. At no time was he made aware of the fact that this was a situation where there could very well be a conflict between himself and his co-defendant.

^o denotes pages in trial transcript

A defendant can always waive his right to individual representation, but the waiver must be knowingly and intelligent. United States v. Wisniewski, 478 F. 2d 274, 281-283 (2d Cir. 1973); United States v. Sheiner, 410 F. 2d 337, 341-343 (2d Cir. 1969) It is the trial Court's responsibility to determine that a waiver is made after a defendant appreciates the dangers inherent in joint representation. United States v. DeBerry, supra, 487 F 2d at 453; United States v. Alberti, 470 F 2d 878, 881-882 (2d Cir. 1972); cf. Morgan v. United States, supra, 396 F 2d at 114.

In the DeBerry case the trial counsel stated that she had discussed the dangers of a conflict with each of the defendants. The Circuit Court believed that this was not enough and that the trial court should have questioned the defendants on the possibility of conflict despite the assurances of the Attorney.

In the instant case at bar there is no mention of the fact that counsel made known to petitioner the dangers of a conflict if he represented both Petitioner and his co-defendant. And the Court never spoke a word about it. The main concern of the Court was to expedite matters and proceed as quickly as possible. The Court and counsel tried to placate the Petitioner about the fact that Mr. Fusco had never appeared before.

The fact that counsel was retained and not assigned should not effect the trial court's duty to determine whether or not joint representation will deprive them of an effective advocate United States v. Alberti, supra, 470 F 2d at 831, cf. People v. Byrne supra, 17 N.Y. 2d at 215.

After the actual testimony began and practically all through the taking of testimony and summation Petitioner was ignored. Total committment was given to the defense of the co-defendant by trial counsel. The object was to show that Colon was not working for himself but was an agent of the undercover officer. Salomon was ignored.

Trial counsel requested that the Court charge "AGENCY OF THE BUYER" for Colon and stated to the Court:

" And I am going to ask Your Honor to charge that agency on behalf of the defendant Colon and I admit that defense is of no value to the defendant Mariano Salomon." (515)

By not asking that Salomon be included in this defense on an in concert basis, counsel in effect stipulated that there was indeed a sale and that Petitioner was guilty.

The defense of agency admits that there was a sale of narcotics but that the seller is not the principal and that he gets no benefit from the sale. He is acting solely for the buyer in this case the undercover officer Galasso. Thus Petitioner's attorney conceded the elements required to be proven of the sale, and in essence conceded that Petitioner was the seller.

Petitioner's trial attorney sacrificed Salomon in order to save Colon. Right from the beginning Petitioner expressed his displeasure with Mr. Fusco. The ineffectiveness of counsel was evident then and continued to display itself throughout the trial and climaxed at sentencing when he asked to be relieved as Petitioner's counsel on pending indictments. (S. 7 & 8) Counsel's primary allegiance still was with Colon and he negotiated pleas of guilty on Colon's pending cases and concurrent sentences on these matters were given. Salomon was left with a prison sentence of natural life with a minimum of twenty years and several pending indictments while Colon received a sentence of natural life with a minimum of 15 years with all other sentences to run concurrently with that.

Petitioner did not even receive minimal effective assistance of counsel and therefore Petitioner should be granted a new trial at which he is afforded counsel of his own.

POINT TWO

THE COURT ERRED IN PERMITTING A SUBSTITUTION OF COUNSEL DURING THE CHARGE AND THE DELIBERATIONS. COUNSEL'S DELINQUENCY HARMED PETITIONER.

It was error for the Court to permit trial counsel to be absent during the charge and the jury's deliberations because substitute counsel who had heard none of the proceedings at trial, failed to take exception to the Court's confusing supplemental

charge. People v. Valentine 45 A.D. 2d 1043 (2nd Dept. 1974).

The jury after several hours of deliberation asked two simple questions which obviously referred to Colon. It asked the Court to repeat the meaning of possession and it also asked whether the same person could be found guilty of sale and innocent of possession (SM p 686.)

The Court took eight pages of the transcript for its thoroughly confusing response to the questions (SM pp. 686-694) in the course of which it misstated the second question (SM p. 691)

"Now, if he cannot be found guilty of the sale of narcotics then the question is can he be found guilty of possession of narcotics".

Apparently despairing of enlightenment from the Court, the jury which by no stretch of the imagination could have penetrated the rambling confused supplemental charge, announced its verdict within a few minutes after the Court had finished speaking. Substitute counsel took no exception.

Reversal is required in such circumstances. Bollenbach v. United States, 326, U.S. 607, 613 (1926). In Bollenbach, the Court said :

"Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judges responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria. When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy."

See also United States v. Bronger, 287 F 2d 498 (7th Cir. 1961) where the Court said (p. 500) That if a supplemental has the effect of confusing a jury a defendant is deprived of a fair trial.

Salomon was prejudiced as was the co-defendant, in Valentine, supra, by the absence of his trial counsel who would have protested the confusing and obfuscating supplemental charge.

POINT THREE

REVERSAL IS REQUIRED BECAUSE OF THE FAILURE OF THE TRIAL JUDGE TO ADMONISH THE JURY PROPERLY IN HIS PRELIMINARY INSTRUCTIONS.

The trial judge completely ignored the mandate of CPL 270.40

in her preliminary instructions to the jury. While it is true that no exception was taken by either side and the court partially complied with the statute during recesses, it is nevertheless urged that reversal should be had. The legislative intent embodied in C.P.L. 270. 40 which is much broader than the predecessor statute CCP 415, was manifestly to assure both sides an impartial jury. It is urged that the views expressed in the leading case under the predecessor statute, People vs. Small, 2 A.D. 2d 935 (3rd Dept. 1956) affd. 2 N.Y. 2d 720, are inapplicable in light of the expanded provisions of the present statute. In SMALL, the Court found no indications from the record that the trial judge had complied with CCP 415. The Court held this to be error but not reversible error because no question appeared to have been raised on the subject at the trial and no untoward incident occurred that was in any way prejudicial to the defendant. The Court held, accordingly, that the error was purely a technical one which did not impair the substantial rights of the defendant.

CPL 270.40 has not been construed. It is contended that this Court should view the statute as being designed to implement the Constitutional right to a jury of absolute integrity. This Court should further hold that the responsibility for complying with the statute rests on the trial judge and that it is inappropriate to place the burden on the Petitioner to see that a judge follows the law. The mandate of the statute which is in the interests of "Due Process" should not be able to be ignored. If it is, prejudice and reversal should be had. cf. People v. Bartone, 12 M 2d 926, 172 N.Y.S. 2d 976 (Co. Ct. Westchester 1958).

POINT FOUR

THE SENTENCE OF IMPRISONMENT FOR NATURAL LIFE WITH A MINIMUM OF TWENTY YEARS WAS EXCESSIVE.

At the time of sentence, trial counsel continued to concentrate on the welfare of Petitioner's co-defendant, Victor Colon. He arranged for all of Colon's pending cases to be disposed of while at the same time asking to withdraw as attorney for Salomon on his four pending indictments.

1

Mr. Fusco stated to the Court that he knew the Court would do what's right. He repeated the fact that the convictions were for Class "A" Felonies and that Petitioner knew this and he asked for leniency.

The Court sentenced Petitioner to life imprisonment with a minimum of twenty years based on reports given to the Court indicating that Petitioner was a substantial dealer in drugs. Nothing appears in the record to substantiate this and nothing was said by counsel to refute it.

The sentence of the Court was excessive in as much as it did not even consider Petitioner's open matters as it did for the co-defendant and this Court should modify this sentence.

POINT FIVE

LIFE FOR A NON-VIOLENT CRIME IS SO HARSH
AS TO CONSTITUTE CRUEL AND UNUSUAL
PUNISHMENT UNDER THE STATE AND FEDERAL
CONSTITUTIONS.

It is well settled that the "Cruel and Unusual Treatment" Clauses of the State and Federal Constitutions (New York Const. Art. I Sec. II; United States Const., 14th. Amst.) requires continued evaluation and definition in light of present-day criteria (Weems v. U.S., 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed 793 (1910)). This stricture applies not only to the method of punishment, but to the severity as well. As the Supreme Court stated in Weems, "It is a precept of justice that punishment for crime should be granted and proportioned to the offense." *supra*, 217 U.S. at 267, 30 S.Ct. at 549.

This rule has been restated in cases in numerous jurisdictions and by the Supreme Court in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L. Ed 2d 246, reh. den. 409 U.S. 902, 93 S.Ct. 89, 34 L. Ed 2d. 163 (1972). In the Furman case, Justice Brennan set forth the test for determination that a punishment is "cruel and unusual":

"...The test, then, will ordinarily be a cumulative one; If a punishment is unusually severe, if there is a stronger probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause that the State may not inflict inhuman and uncivilized punishment upon those convicted of crimes."
(Furman v. Georgia, supra at 242)

In the Furman case, the Court was examining the question of the constitutionality of the death sentence. Justice Branden noted that since capital punishment is "... not a recent phenomenon, if it violates the constitution, it does so because it is excessive or unnecessary or because it is abhorrent to currently existing moral values." Furman v. Georgia, supra at 333. The Court decided that the punishment did meet these criteria and was therefore unconstitutional.

In determining whether the punishment decreed for the petitioner in the instant case is cruel and unusual, the criteria set forth in a California case in which the Supreme Court of that State, in the spirit of Weems and Furman, declared cruel and unusual a mandatory term of life for a second offense of indecent exposure, can be applied. These criteria are :

- (1) Whether the punishment fits the crime and the offender;
- (2) Comparison of the punishment with punishment prescribed in the same jurisdiction for more serious offenses and;
- (3) Comparison of the challenged punishment with punishment for the same offense in other jurisdictions.

In re LYNCH, 8 Cal. 3d 410, 105 Cal. Rptr. 217, 503 P. 2d 921 (Sup. Ct. Cal. 1972)

In a recent decision in which the Court of Appeals of the State of New York, refused to overturn the drug laws, it did acknowledge that the character of the defendant should be considered in determining whether his punishment falls under the "cruel and unusual punishment" proscription. People v. Broddie, 37 N.Y. 2d 100, 371 N.Y.S. 2d 333 (1974), cert. den'd 44 U.S.L.W.

3280, Nov. 11, 1975, ____ U.S. _____. The profile of the Petitioner in the case at bar does not even remotely resemble any of the defendants described in the Broadie decision.

The drug laws as they exist have grievously harmed the Petitioner. He is treated more harshly in New York than he would have been anywhere else in this nation. Indeed, in this jurisdiction the only crime which would have resulted in a heavier sentence would have been First Degree Murder (P.L. Sec. 125.27). Only Arson First (P.L. Sec. 150.20) Kidnapping (P.L. Sec. 135.25), Murder (P.L. Sec. 125.25) and attempted Murder of a Police Officer (P.L. Sec. 110.05 (1)) mandate life terms. Of these, only the drug offenses preclude parole before the mandated minimum term is served. Furthermore, the only non-violent crime carrying these penalties is the drug-related offense.

Examination of the laws of other jurisdictions reveals that New York has the most stringent drug laws in the nation. Only five other states mandates a life sentence for a drug offense (Arizona, California, Missouri, Montana, Texas). Most States differentiate between a first offender and a recidivist by drastically increasing the minimum sentence for a second conviction for a drug-related offense. For example, Alabama doubles the 2-15 year sentence for a second offense (Code of Ala., Tit. 22 Sec. 258 (40)); Oklahoma doubles the 5-20 year sentence (63 k. St. Ann. Sec. 2-401 (B)(1)); Vermont increases the sentence from "not more than 5 years" to 25 years (18V. Stat. Sec. 4224 (g)). California, a State with a drug problem similar to New York's mandates a sentence of 5 years to life for a first offense and 10 years to life for a second offense, but permits parole after 3 years for a first offense, only increasing this to the full minimum term for a second conviction. (West's Ann. Code, Health and Safety Sec. 11352 (a)). It can be said that it is reasonable to severely treat a second offender in a drug-related offense, since he or she has now demonstrated that rehabilitation probably will not be effective, and most of our States have indeed done this.

In virtually every state in the Union there is flexibility and reason in the Law which is absent from the rigid New York Statutes.

Thus, when one compares the laws of New York State with those of other jurisdictions, and the sentencing for this crime as compared to other crimes in this State, and considers the individual facts of this particular case at bar combined with the nature of the Petitioner, it becomes apparent that the rigidly defined punishment of not less than 20 years minimum to life is arbitrary and cruel and unusual punishment as defined in the State and Federal Constitutions and in the case law. Clearly, the sentence is disproportionate to the offense and to the offender, and will serve no purpose but to release an elderly man into society (if indeed, the whim of the Parole Board goes into the Petitioner's favor), at a time when his advancing age will be more than likely that he will spend the rest of his life on welfare.

The Courts of this State (New York) have never struck down a Penal Sanction on the grounds of disproportionality, although the validity of using this basis for determining a punishment "cruel and unusual" has been acknowledged by the Court of Appeals (People v. Broddie, 371 N.Y.S. 2d 471, 481). This, of course, does not now preclude this Court from now deciding that the time has come to break from this "traditional" view and determining that the sentence mandate for a "A-1" offense, as specified under the Drug Laws, are excessively harsh.

The Michigan Supreme Court, in striking down a law mandating a compulsory 20 year minimum sentence for offenders dispensing marijuana, aptly stated :

"...A compulsory prison sentence of 20 years for a non-violent crime imposed without consideration for defendant's individual personality and history is so excessive that it 'shocks the conscience.' " (People v. Lorentzen, 387 Mich. 167, 194 A.2d 827, 834 (Sup. Ct. Mich. 1972))

Sentencing this Petitioner to a mandatory sentence of 20 years to life for the non-violent crime, must just as surely "shock the conscience" of this Honorable Court.

POINT SIX

A MANDATORY SENTENCE (MINIMUM) OF 20 YEARS FOR A NON-VIOLENT CRIME AND PROVIDES FOR NO OPPORTUNITY FOR PAROLE IN THAT TIME IS SO HARSH AS TO CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT UNDER THE STATE AND FEDERAL CONSTITUTIONS.

Even if this Honorable Court (United States District Court) does find that the provisions for sentencing under the drug laws are constitutional, the provision for mandatory minimum of at least 20 years, with no opportunity for parole, is excessively harsh. The principal of disproportionality applies equally to this single provision as it does to the larger scope of the statute.

In People v. Foss, 112 Cal. Rptr. 648, 519 P. 2d 1073 (Sup. Ct. Cal. 1974), the Court struck down that portion of a statute which provided for no parole for a 10 year period for a second drug-related offense. In that case, the defendant had a 14 year old conviction for possession of heroin and was convicted on five counts of furnishing heroin under the California Health and Safety Code.

Only the State of Colorado has a drug law with a mandatory minimum without parole for a first offense which is as harsh as the New York Law (C.R.S. 1973 12-22-322 (c)). In all other States, the first offender is treated differently from the recidivist. Even then, only four states still require a mandatory 10 year minimum sentence without parole for the second offender (Alaska, Arizona, Georgia and Nebraska). As has been noted, the California provision was declared unconstitutional under the Foss decision.

The advisory Council of Judges of the National Council on Crime and Delinquency, in its Model Sentencing Act, rejects the concept of mandatory minimum terms of imprisonment (Model Sentencing Act 9 Crime and Delinquency 339, 365 Com. on Sec. 13). The ABA Project on Minimum Standards for Criminal Justice also recommends against this type of sentence (Standards Relating to Sentencing Alternatives and Procedures, Approved Draft (1968 Sec. 32 Subd. (a), p. 142). These learned committees have rejected the use of mandatory minimum sentences without parole as counterproductive to the goal of rehabilitation of the defendant. This is

particularly true in the instant case, where the petitioner will not be eligible for parole until close to retirement age, leaving him in the discouraging predicament of having to seek employment at a time when most doors will be closed to him because of his advancing age, not to mention the stigma of his criminal conviction.

The entire record of this proceeding in the Supreme Court, of New York County, mandates that both the judgment of conviction and sentence of the Petitioner be vacated.

POINT SEVEN

IS NEW YORK PENAL LAW SECTION 70.00, CALLING FOR MANDATORY SENTENCES UNCONSTITUTIONAL, WHEN IT DOES NOT DRAW ITS MEANING FROM THE EVOLVING STANDARDS OF DECENCY THAT MARK THE PROGRESS OF A MATURING SOCIETY ?

The eighth Amendment's prohibition against cruel and unusual punishment is not a static concept. People v. Broddie, 45 A.D. 2d 649, 652 (2nd Dept. 1974). The Court quoted Trop v. Dulles, 456 U.S. 86, 100-101 that this concept "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

As to a test by which a penalty, challenged as being cruel and unusual could be judged, this court cited Mr. Justice Brennan's concurring opinion in Furman v. Georgia, 408 U.S. 238, 282 "The test, then, will ordinarily be a cumulative one: If a punishment is severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the clauses that the State may not inflict inhuman and uncivilized punishment upon those convicted of crimes."

Justice Brennan emphasized throughout his opinion that the crux of the prohibition against cruel and inhuman punishment was the need to uphold the dignity of man. For example, stating at page 271 "The primary principle is that a punishment must not be so severe as to be degrading to the dignity of human man."

Justice Brennan concluded with a finding that the death penalty was per se prohibited by the clause. He noted the other cases (WEEMS v. UNITED STATES, 217 U.S. 349 (1910), Trop v. DULLES, supra, Robinson v. California, 370 U.S. 660) where the Supreme Court had also found violations of the clause and that it was from an analysis of these holdings that he arrived at the four point test stated above. However, although he would find that here the death penalty was inconsistent with all four principals, at 305, it would appear that Justice Brennan absolutely required that all four principles be violated before he would hold that a certain punishment was prohibited.

In fact other members of the majority in Furman, supra, concluded that the death penalty was cruel and unusual by other reasoning processes, see Mr. Justice Marshall after a thorough review of all previous cases in which the Supreme Court had been faced with the question of what constituted "Cruel and Unusual Punishment", Furman, supra, at 322-328 concluded "The decisions discussed in the previous section imply that a punishment may be deemed cruel and unusual for any one^{of} four distinct reasons," at 330 (Emphasis added by writer)

ly
ld

Therefore, it would appear that although the Court will look to see if all four reasons are present to base its findings upon, it is not de rigueur that they in fact be present. The excessive "quality" of any given factor can very well determine the matter. (See Robinson v. California, supra, where the penalty was only 90 days sentence, yet the Supreme Court found it to be excessive under the circumstances and hence unconstitutional as a cruel and unusual punishment.) In the case at Bar we have an unusually severe punishment. It is hard to imagine a more severe punishment than mandatory life imprisonment, " for a non-violent crime."

Given such a situation any analysis about whether we have a cruel and unusual punishment situation must begin by weighing the penalty in relation to the offense. See Weems v. United States; supra. Comparing the punishment inflicted for other crimes as well

as to those penalties imposed for similar crimes in other jurisdictions. See, Justice Marshall concurring at 327. Excessive punishment is as objectionable as those punishments that are inherently cruel. Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947)

The drug here is cocaine not heroin or any other opium derivative. Although the Legislature determination must be given great weight in its exercise of its powers to classify a substance People v. Hoffman, 76 Misc. 2d 564 (Sup. Ct. N.Y. County 1974), the Court there, supra 565, did state "It is true that, medically and pharmacologically, cocaine is not a narcotic drug in the true sense" Here we have a situation where the penalty imposed for possession of cocaine is equivalent to that of the intentional commitment of murder.

Given the excessiveness of the sentence, imprisonment for life, in relation to the offense involved, possession of a medically non-narcotic substance and in view of our society's evolving standards of decency such a punishment must be held to be "Cruel and Unusual", and therefore "Unconstitutional."

Further the Statutory sentence here has in fact an overpowering element of arbitrariness to it. Although the sentence, contains a mandatory maximum of life imprisonment the minimum sentence, also statutorily ordained, gives the trial judge discretion in imposing either a fifteen or twenty-five year minimum. Considering the fact that this will be time served, this becomes a very serious source of arbitrariness.

This situation where mandatory life imprisonment is comparable to the penalty exacted for murder, the irresistible conclusion is that contemporary society substantially rejects the imposition of life imprisonment except in the most heinous of all offenses. It is not enough for a Court to say that in the eyes of the law mandatory life imprisonment is not considered either barbaric or tortorous per se. Cruel and unusual punishment is not a static concept.

What the WEEMS court in 1910 had to find to announce a landmark

decision for that time is not the same thing that the Supreme Court in 1975 would have to fine. Especially in a society as dynamic and in constant flux as ours today, standards change and what might have been acceptable a century ago need not be found on close scrutiny to be so today.

Finally we reach Mr. Justice Brennan's fourth point, is there any reason to believe that mandatory life imprisonment serves any penal purpose more effectively than some less severe punishment. It will not do for this Honorable Court to "just find" that there is a presumption that the legislature has found the facts necessary to support the enactment. A Court when confronted with a claim that a statute is violative of the cruel and unusual punishment clause of the Constitution must analyze the statute in question with a view towards its purpose (Furman v. Georgia, supra, at 343). Retaliation, retribution and vengeance are to be condemned as purposes. As Mr. Justice Marshall points out " . . . the Eighth Amendment itself was adopted to prevent punishment from becoming synonymous with vengeance." Furman v. Georgia, supra, at 381 that the State can require from the convicted, no more. The penalty must be in direct relation to the offense. Here it is excessive. It is cruel and inhuman to deprive a man by the severity of a mandatory life sentence of the hope of rehabilitation and reformation.

The Statutes in question must be held violative of the
Federal and State Constitution.

For the reasons stated above, the judgment of conviction
should be reversed, the indictment dismissed, or in the alternative
a new trial ordered.

Respectfully submitted,

Mariano Salomon

Mariano Salomon

Petitioner, in Pro se

Box B 74 A 3792

Dannemora, New York 12929

Sworn to before me this 9 day
of March, 1976.

Henry J. Bogan

Notary Public of the State of New York

(seal)

NOTARY CLERK
NOTARY PUBLIC

At a term of the Appellate Division of the
Supreme Court held in and for the First
Judicial Department in the County of New York
on December 4, 1975.

Present-Hon. Harold A. Stevens, Presiding Justice

Arthur Markewich

Theodore R. Kupferman

Louis J. Capozzoli

Myles J. Lane, Justices.

The People of the State of New York	:	
Respondents,	:	Order of Affirmance on
- against -	:	from Judgment
Mariano Salomon,	:	
Defendant-Appellant.	:	I558

An Appeal having been taken to this Court by the Defendant-Appellant from the judgment of the Supreme Court, New York County (Lowe, J.), rendered on June 11, 1974, convicting him of the crimes of criminal sale of a controlled substance in the first degree and criminal possession of a controlled substance in the first degree, and said appeal having been argued by Mr. Howard S. Jaffe of counsel for the appellant, and by Mr. Richard A. Cirgenti of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed.

ENTER: HENRY W. CAMBO

Clerk.

Counsel for appellant is referred to
§ 606.5, Rules of the Appellate
Division, First Department.

A T R U E C O P Y

(E X H I B I T "A")

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. CHARLES D. BREITEL, Chief Judge

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

against

MARIANE SALOMON,

Defendant-Appellant.

CERTIFICATE
DENYING
LEAVE

I, CHARLES D. BREITEL, Chief Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,^o there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York, New York
January 20, 1976.

Charles D. Breitel

Chief Judge

Howard S. Jaffe, Esq.
401 Broadway, Suite 1812
New York, New York 10013

Hon. Robert M. Morgenthau
District Attorney, New York Co.
155 Leonard Street
New York, New York

Clerk, Court of Appeals

^oDescription of Order

12-4-75 App Div 1st affmd. 6-II-74 Sup. Ct., N.Y.Co

A P P E A L C O P Y

E X H I B I T "B"

EXHIBIT F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARIANO SALOMON,

Petitioner,

-against-

HON. J. EDWIN LaVALLEE, Superintendent,
Clinton Correctional Facility,

Respondent.

X

:

:

: AFFIDAVIT IN OPPOSITION

: 76 Civ. 1640

:

X

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

file
Also delivered
to Judge Palko
Transcript of Trial
7-14-76

JOAN P. SCANNELL, being duly sworn, deposes and says:

1. I am a Deputy Assistant Attorney General in the office of LOUIS J. LEFKOWITZ, Attorney General of the State of New York, attorney for the respondent herein. I submit this affidavit in opposition to petitioner's application for a writ of habeas corpus.

2. Petitioner was convicted on June 11, 1974 in the Supreme Court, New York County after a jury trial of the crimes of Criminal Sale of a Controlled Substance in the First Degree and Criminal Possession of a Controlled Substance in the First Degree. Petitioner was sentenced to indeterminate sentences of twenty years to life. The conviction was affirmed by the Appellate Division, First Department and petitioner was denied leave to appeal to the New York Court of Appeals. Petitioner is presently incarcerated in Clinton Correctional Facility.

3. The Statement of Facts in the instant case are obtained from the District Attorney's brief submitted to the Appellate Division, First Department and are attached hereto as Exhibit "A".

4. In the instant application, petitioner claims that he was deprived of effective assistance of counsel in that there was a conflict of interest caused by his attorney's representation of himself and his co-defendant. Petitioner also claims that the court erred, in permitting a substitution of counsel during the Court's charge and jury deliberations, and in its failure to admonish the jury properly in her preliminary instructions. Finally petitioner claims that his mandatory sentence was excessive, constituted cruel and unusual punishment, and was unconstitutional.

5. Petitioner's allegation that he was deprived of effective assistance of counsel due to a conflict of interest between himself and his co-defendant is wholly unsupported by the record. At no time before or during trial did petitioner request another attorney or claim that his defense was hampered by the attorney's joint representation of himself and his co-defendant. Before trial petitioner requested an adjournment because he felt that he had not had sufficient time to speak with his attorney. The Court granted petitioner an hour recess (10). When petitioner returned from the recess the Court specifically asked petitioner if he had "any feelings that Mr. Fuco could not adequately represent him on his trial" (14). Petitioner then stated "It's all right, Your Honor. . . Everything is all right" (14). Petitioner never stated that he wished another attorney or that any conflict existed.

The law is clear that joint representation is not per se a denial of effective assistance of counsel. People v. Gonzalez, 30 N Y 2d 28 (1972) cert. den. 409 U.S. 859 (1972). Moreover, the Federal Courts require that where a defendant has claimed ineffective assistance of counsel, he must show some specific

instance of prejudice, some real conflict, which resulted from a joint representation. United States v. DeBerry, 487 F. 2d 488. (2d Cir. 1973).

In the instant case not only did petitioner never claim his counsel was inadequate but he has wholly failed to demonstrate any conflict interest or any prejudice resulting from counsel's representation. Petitioner makes much of the fact that counsel requested an agency charge for petitioner's co-defendant and not petitioner. It is clear that counsel did not request an agency charge for petitioner because he was not entitled to such a charge. From the evidence at trial there was no indication that petitioner was anything but a principal seller. No view of the evidence would have supported a defense of agency whereas the evidence against petitioner's co-defendant raised an issue of fact for the jury as to whether he was a buyers agent. The evidence showed that the co-defendant could not independently quote a price for a pound of cocaine but had to check with someone else and then get back to the undercover officer (252, 257). In addition the co-defendant did not personally deliver the package at the time of the sale. Rather, the undercover officer and the co-defendant had to wait for petitioner to make the delivery (2730).

Contrary to petitioner's allegation the record clearly shows that his counsel despite the overwhelming evidence, provided more than adequate representation unhampered by a conflict of interest. He conducted a vigorous cross-examination of the people's witnesses on behalf of both defendants. Moreover, he objected to the admission into evidence against petitioner, taped conversations between the co-defendant and the undercover officer whereas he did not object to their use against the co-defendant (52-3). Further, petitioner's counsel requested that the Court

instruct the jury that what petitioner's co-defendant did not binding on petitioner (285-6). The court granted counsel's request. Also in counsel's summation he impressed upon the jury that petitioner at the time of the sale stated "I have nothing to do with this, nothing at all" (633). Thus, the record clearly demonstrates that petitioner was adequately represented.

6. Petitioner also claims that the Trial Court erred in permitting a substitution of counsel during the Court's charge and jury deliberation. Yet petitioner neglects to mention that he consented to his attorney's withdrawal (Min. of Sen. p. 7). Petitioner claims that the court's charge was confusing and his original counsel would have protested. This claim is likewise without merit the substituted attorney clearly had as much ability and opportunity to object to a confusing supplemental charge as did petitioner's original attorney.

7. Petitioner's final contention is that his sentence was excessive and that the mandatory drug sentence is unconstitutional. The mandatory sentence for drug offenses has been upheld as constitutional. People v. Broadie, 37 N Y 2d 100 (1975) cert. den. 44 U.S.L.W. 5358 (Nov. 11, 1975). Further a sentence which is within the statutory limits is not a subject for federal habeas corpus review. Townsend v. Burke, 334 U.S. 736, 741 (1948) (United States ex rel. Marcial v. Fay, 267 F. 2d 507, 509-510 [2d Cir. 1959]).

8. Petitioner also claims that the Trial Judge failed to admonish the jury properly in her preliminary instructions. This claim was never raised by petitioner on appeal from his conviction. Thus, petitioner has failed to exhaust his available state remedies on this issue. Fay v. Noia, 372 U.S. 391 (1963).

Even assuming arguendo error resulted from the preliminary instructions it would have been harmless error in view of the overwhelming evidence against petitioner. Moreover a review of the record reveals that the Court's preliminary instructions were proper and the Court had earlier admonished the jury on several occasions not to discuss the case (20, 22, 24).

WHEREFORE, respondent respectfully requests the petition be dismissed in all respects.

JOAN P. SCANNELL

Sworn to before me this
14th day of July, 1976

Assistant Attorney General
of the State of New York